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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PING JIANG) Case No.: C 07-3909 CRB
vs.)
MICHAEL CHERTOFF, Secretary of the)
Department of Homeland Security;)
ROBERT S. MUELLER,)
Director of Federal Bureau of Investigation)
Defendants.)
Plaintiff,)
REPLY TO DEFENDANTS'
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANTS
CROSS MOTION FOR SUMMARY
JUDGMENT
Date: November 30, 2007
Time: 10:00 a.m.

Plaintiff filed a motion for summary judgment for hearing on September 7, 2007.
Defendants filed opposition and cross-motion for summary judgment on November 2, 2007.
Plaintiffs herein file their reply to Defendants' opposition. Plaintiff is entitled to summary
judgment as a matter of law because Defendants have failed to act reasonably as a matter of law.

Plaintiff has complied with the requirements under Section 245 of the Immigration and
Nationality Act and 8 U.S.C. §1255 for adjudication of his adjustment of status application and
Defendants do not contest that Plaintiff has met all the statutory requirements for adjustment of
status. Defendants contend that it is the FBI name check that is cause for delay and that delay is
not unreasonable. However, if security concerns are indeed a top priority, it would follow that
name checks should be completed as soon as expediently possible rather than be pending
indefinitely as they have in this case. Furthermore, although no time frame exists on the face of

1 the statute, Defendants do not have the discretion not to carry out their duties as delegated to
2 them by Congress, namely to make a decision on Plaintiff's adjustment of status application.
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4 Not only does the USCIS have a non-discretionary duty to adjudicate Plaintiff's
5 adjustment of status application, the FBI has a clear, non-discretionary duty to complete the name
6 check. The FBI name check is a security check utilized by the USCIS to investigate the
7 background of applicants. *Toor v. Still*, 2007 WL 2028407, at *1 (N.D. Cal. 2007). The FBI
8 operates under a direct and specific statutory mandate whereby it is required to act on, and
9 provide information in response to requests from other federal agencies, including the USCIS.
10 Section 28 U.S.C. § 534(a)(4) provides that, under the direction of the Attorney General, the FBI
11 shall "exchange such records and information with, and for the official use of, authorized
12 officials of the Federal Government...." Furthermore, "the Director of the Federal Bureau of
13 Investigation shall provide the Department of State and the Services [USCIS] access to the
14 criminal history record information contained in the National Crime Information Center's
15 Interstate Identification Index (NCIC-III), Wanted Person File, and to any other files maintained
16 by the National Crime Information Center." 8 U.S.C. § 1105(b)(1). *See Singh v. Still*, 470 F.
17 Supp. 2d 1067, 1068 (N.D. Cal. 2007). Moreover, the FBI must make a diligent presentation of
18 updated information to USCIS. Section 8 U.S.C. § 1105(3) provides that "The Federal Bureau of
19 Investigation shall provide periodic updates of the extracts at intervals mutually agreed upon with
20 the agency receiving the access." As a whole, these statutory provisions provide a direct and
21 unequivocal mandate to the FBI to provide current information to USCIS. The Defendant FBI
22 therefore operates under a direct statutory mandate to provide information upon request from
23 federal agencies without unreasonable delay. Plaintiff is simply requesting that Defendant FBI
24 carry out functions as delineated by Congress and at the specific request of USCIS.

25 Although there is no specified deadline within 8 U.S.C. § 1105(3), a name check request
26 should be completed within a reasonable time. This time requirement can be paralleled to the
27 interpretation of 8 U.S.C. § 1255, whereby it has been determined by adjudication that an agency
28 must act within a reasonable time despite the fact that no specific time appears on the face of this

1 statute. *Yu*, 36 F. Supp. 2d at 932; *Agbemapple v. Ins.*, No. 97 C 8547, 1998 WL 292441, at *2
 2 (N.D. Ill. 1998). The lack of a specified deadline within the statute does not lessen Defendants
 3 duty to Plaintiff to adjudicate his petition. *Razaq v. Poulous*, 2007 WL 61844, at *4 (N.D. Cal.
 4 Jan. 8, 2007)(“The fact that neither the statute nor regulations establish a specific deadline does
 5 not change the character of the duty itself … Congress expected the executive branch to receive
 6 applications of this kind and then to ‘adjudicate’ them to decision.”). Furthermore, a general
 7 timing provision for agencies is provided within the APA at 5 U.S.C. § 555(b), which states that
 8 agency action should be concluded within a reasonable time. *See Forest Guardians v. Babbitt*,
 9 174 F.3d 1178, 1190 (10th Cir. 1999). The FBI has a mandatory duty and obligation to act within
 10 a reasonable period of time. 5 U.S.C. § 555(b). Allowing the Defendant FBI an unlimited
 11 amount of time to process a name check request would be contrary to the “reasonable time”
 12 frame mandated under 5 U.S.C. § 555(b) and 5 U.S.C. § 706(1) and thus could ultimately negate
 13 the Defendant FBI’s duty under 8 U.S.C. § 1105. *Dong v. Chertoff*, 2007 WL 2601107, at *11
 14 (N.D. Cal. Sept. 6, 2007)(under the APA, a court “shall” compel agency action unlawfully
 15 withheld or unreasonably delayed); *Gelfer v. Chertoff*, 2007 WL 902382, at *2 (N.D. Cal. March
 16 22, 2007)(allowing the respondents a limitless amount of time to adjudicate petitioner’s
 17 application would be contrary to the “reasonable time” frame mandated under 5 U.S.C. § 555(b)
 18 and, ultimately, could negate the USCIS’s duty under 8 C.F.R. 245.2(a)(5)).

19 The Defendants contend that one of the reasons for the delay of the name check is due to
 20 the volume of requests that the FBI receives. Defendants’ Cross Motion for Summary Judgment,
 21 p. 4. However, no specifics are offered with respect to the delay in Plaintiff’s case, whether there
 22 is a “hit,” commonality of name issues, etc. Defendants’ argue that the delay is reasonable
 23 simply because of the number of outstanding name check requests. This Court in *Singh* asserted
 24 that “mere invocation of national security is not enough to render agency delay reasonable per
 25 se.” 470 F.Supp.2d at 1069, *See also Fu v. Gonzales*, 2007 WL 1455873, at *3 (N.D.Cal. May
 26 17, 2007)(“this Court also concurs that simply asserting a need to await results of an FBI name
 27 check does not suffice to show the delay was reasonable as a matter of law”). Defendants
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1 attempt to place the blame solely on the FBI or to use security concerns as way to end the inquiry
 2 into the evaluation of reasonableness. Furthermore, this Court recently asserted that it “is not in a
 3 position to relieve the Defendant of their obligation to comply with their mandatory duties.”
 4 *Dong*, 2007 WL 2601107, at *11. Defendants have failed to provide specific evidence as to why
 5 the name check has not been completed or whether Defendants are diligent in trying to complete
 6 the name check.

7 Defendants further allege that Plaintiff in essence seeks to force the FBI to act in a more
 8 expeditious manner. Defendants’ Cross Motion for Summary Judgment, p. 8. However,
 9 Plaintiff is not seeking to jump ahead of others, but merely that the Defendant FBI fulfill their
 10 duty to act on the name check. Without the relief of mandamus, the FBI could withhold or fail to
 11 complete a name check request indefinitely. *See Dong*, 2007 WL 2601107, at *12 (these
 12 Plaintiffs have more than “waited their turn,” having seen millions of later-filed applications
 13 processed before theirs).

14 In a mandamus case decided before this Court, where an FBI check caused a delay in
 15 processing, the Court granted summary judgment compelling the defendants to adjudicate two I-
 16 485 applications. *Singh*, 470 F. Supp. 2d at 1068. The Court asserted that even though the FBI
 17 was not directly named in the mandamus suit, its conduct would properly be within the scope of
 18 the complaint if it were determined that it was largely responsible for the delay. The Court
 19 asserted that the critical issue “is not whether a particular branch of federal government is
 20 responsible for the delay; it is whether the individual petitioner versus the government *qua*
 21 government is responsible.” *Id. See Paunescu v. INS*, 76 F.Supp.2d 896, 903 (N.D. Ill. 1999)
 22 (rejected the defendants’ attempt “to deftly transfer blame and responsibility from one
 23 government entity to another” as a “shell game” because “the INS, the FBI, and the State
 24 Department are all arms of the United States of America.”). This Court ultimately determined
 25 that both the USCIS and FBI had a duty to process name checks within a reasonable time. *Singh*,
 26 470 F. Supp. 2d at 1068.

27 The Defendants have a statutorily prescribed duty to adjudicate adjustment of status
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1 applications and conduct a name check request "within a reasonable time." Plaintiff is not
 2 seeking to compel action over *how* Defendants process the adjustment of status application, what
 3 Defendants call "pre-adjudication," but simply to compel action on their non-discretionary duty
 4 to *take* action.

5 Mandamus relief in adjustment of status cases, such as this one, can be granted due solely
 6 to the length of the delay. In a case before this district, Judge Alsup found that a more than two
 7 year delay to be unreasonable as a matter of law. *Gelfer v. Chertoff*, 2007 WL 902382 at *2 (N.D.
 8 Cal. March 22, 2007). Even without a statutory timetable, reasonableness of delay can be
 9 determined through various means, including the application of the *Telecommunications Research*
 10 & *Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C.Cir. 1984) (TRAC) factors and consideration of the
 11 reasons for the delay, complexity of the case, and the agency's own average processing times¹.

12 Plaintiff can demonstrate that Defendants have a mandatory non-discretionary duty to
 13 adjudicate his adjustment of status application and to complete the name check. Plaintiff filed his
 14 case 35 months ago. Mandamus relief is warranted here because there is no indication of good
 15 faith efforts by Defendants to alleviate the delay. Defendants have not proffered any evidence
 16 demonstrating that Plaintiff is not eligible for adjustment of status or that national security
 17 concerns are implicated specifically in relation to Plaintiff's case. Using the catch-all of "security
 18 concerns," does not alleviate Defendants duty to act within a reasonable time as required from
 19 them under the Administrative Procedures Act (APA), 5 U.S.C. §§ 555(b) and 706(1).

20 **CONCLUSION**

21 For the reasons set forth herein, Plaintiff respectfully requests that the Court grant
 22 summary judgment as a matter of law in favor of the Plaintiff because the Defendants have
 23 unreasonably delayed in adjudicating Plaintiff's adjustment of status application.

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 27 ¹Defendants contend that these processing times refer to applications within routine name
 28 checks and do not apply to the case at hand but fail to indicate why Plaintiff's application does
 not fall under "routine name checks". Defendants' Cross Motion for Summary Judgment, p. 8.

1 DATED: November 8, 2007

Respectfully submitted,

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/s/

Justin X. Wang
Attorney for Plaintiff